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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

TRAN QUI THAN, PETITIONER

v.

DONALD T. REGAN,
SECRETARY OF THE TREASURY

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May the Secretary of the Treasury lawfully continue to freeze assets of refugees from Vietnam for use as a bargaining tool in future negotiations between the United States and the communist government of Vietnam?

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v.

DONALD T. REGAN
SECRETARY OF THE TREASURY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Tran Qui Than, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on October 13, 1981, which affirmed an order and judgment of the District Court for the Northern District of California granting summary judgment for the respondent.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 658 F.2d 1296, and is set forth in Appendix A, infra.

The order of the Court of Appeals denying petitioner's motion for reconsideration is not reported and is set forth in Appendix B.

The opinion of the District Court for the Northern District of California is reported at 469 F.Supp. 1202, sub nom. Tran Qui Than v. W. Michael Blumenthal, and is set forth in Appendix C.

A letter communication, comprising the administrative decision by the Foreign Assets Control Division, Department of the Treasury, denying petitioner's application for a license to unblock assets is unreported and is set forth in Appendix D.

JURISDICTION OF THIS COURT TO ENTERTAIN THE PETITION

The judgment of the Court of Appeals was entered on October 13, 1981. A timely petition for reconsideration was denied by the Court of Appeals on March 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL JURISDICTION BEFORE THE DISTRICT COURT

Federal jurisdiction was invoked under 28 U.S.C. §1346; 28 U.S.C. §1331; and 50 U.S.C. App. §9(a).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

This case primarily involves a challenge to the applications of Section 5(b)(1)(B) of the Trading With the Enemy Act (henceforth "TWEA"), 50 U.S.C. App. §5(b)(1)(B) which provides in pertinent part as follows:*

> (b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise,

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*/The section as quoted does not reflect the changes made by amendment in 1977. Pub. L.No. 95-223 §101(a), 91 Stat. 1625. The current version of Section 5(b) restricts the President's authority to times of war. However, the restriction in the amendment to the statute was made prospective only by §101(b) and (c) of Pub.L. 95-223 and this case is governed by the statute as quoted above.

Section 5(b) is identical with 12 U.S.C §95a. It is also nearly identical with §203(a)(1) of the International Emergency Economic Powers Act, 91 Stat. 1626, 50 U.S.C. §1702(a)(1). That section, however, continues the President's authority to act in time of peace, but only during a declared national emergency. 50 U.S.C. §1702(a)(1) is set out in pertinent part in Appendix E.

and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise --

* * * * *

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition holding, withholding, use, transfer, withdrawal, transportaiton, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

* * * * *

Petitioner alleges an uncompensated taking of his property in violation of the just compensation clause of the Fifth Amendment to the United States Constitution which provides in pertinent part:

> No person shall be. . . deprived of . . . property, without due process of law; nor shall private property be taken for a public use, without just compensation.

Sections of the Foreign Assets Control Regulations, 31 C.F.R. Part 500 (1981) which implement TWEA §5(b) are also in-

volved: 31 C.F.R. §§500.201, 500.312 and 500.505. These are set out in Appendix E.

For ease of reference, petitioner also includes in Appendix E the pertinent text of the following statutes which are referred to in this Petition: 22 U.S.C. §1645h, 50 U.S.C. §1702(a)(1), 50 U.S.C. App. §9(a).

STATEMENT OF THE CASE

Petitioner is a Vietnamese refugee who lives in California.[1] He fled Vietnam five days before the communist forces of North Vietnam overwhelmed the Republic of Vietnam (South Vietnam) on April 30, 1975 and established in Saigon the Provisional Revolutionary Government ("P.R.G."). Petitioner was the President and General Director, as well as one of 11 shareholder-directors, of the Dong Phuong Bank ("the bank"), a private banking corporation established in 1968 under the laws of the Republic of Vietnam. The bank had its headquarters in Saigon and operated 22 branches in the northern provinces.[1]

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[1] Petitioner entered the United States as a refugee with "parole status" granted by the Attorney General under Section 1182(d)(5) of the Immigration and Nationality Act, 8 U.S.C. §1182(d)(5).

Pursuant to 31 C.F.R. § 500.505 petitioner is an "unblocked national".

In March and early April 1975, communist forces from North Vietnam launched a major and successful attack which resulted in the takeover of all the northern provinces in Vietnam. All of the bank's branches were confiscated. On April 15, 1975, the shareholder-directors met in Saigon to determine what action they should take with respect to the bank and its remaining assets in light of the imminent fall of Saigon. Conditions in Saigon were by then chaotic; the government of the Republic of Vietnam threatened sanctions against any corporate actions deemed to impair public morals (such as voluntary corporate dissolutions).

Fearing for their personal safety and in light of the government's threats, the shareholder-directors were unable to take formal steps to liquidate the bank. Instead, they adopted a resolution providing that those members of the Management Board

able to leave the country "will be qualified to manage and to make use of all the accounts of Dong Phuong Bank in banks located out of Vietnam as well as all properties that the Dong Phuong Bank possessees abroad." (App. A, 4, f.n. 2). This resolution was to be "enforced beginning the day when ... Saigon ... will be occupied by the Communist government." (App. A, 5-6, f.n. 3).

The bank closed its doors and ceased operations as a private bank on April 28, 1975. Between April 15 and April 28, 1975 the bank liquidated its securities portfolio and returned funds to depositors. Immediately upon the fall of Saigon, at 0203 G.M.T., May 1, 1975, the P.R.G. broadcast Communique No. 3, which decreed in relevant part:

> All public offices, public organs, barracks, industrial, agricultural and commerical establishments, banks, communication and transport [facilities] ... together with documents, files, property and technical means of

> U.S. imperialist and the Saigon administration -- will be confiscated and, from now on, managed by the revolutionary administration.

Prior to April 30, 1975, the bank had become the assignee of a claim for $221,235 owed by the United States to a contractor for services rendered to the U.S. Army in Vietnam which the United States had not paid.[2]

After arriving in the United States, petitioner requested payment of that sum on behalf of the bank, but the Army refused to pay on the ground that the monies owed had been blocked by the Secretary of the Treasury when the Foreign Assets Control Regulations were extended to South Vietnam on April 30, 1975. 31 C.F.R. §500.201(d) (Part

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[2] The bank had provided interim financing to the contractor and had, with the approval of the U.S. Army, taken back an assignment of the contract amount payable by the Army. The contractor had fully performed its contract with the Army. (App. C,5-6).

I). Thereafter, petitioner applied to the Treasury Department's office of Foreign Assets Control in his own right and on behalf of six other shareholder-directors who had also fled Vietnam[3] for a license to unblock the sum owed to the bank by the Army.

In his application, petitioner stated that the bank had to release its assignment to the Army before the Army could make payment to the contractor. All the principals in the contractor's organization were in the United States and the Army wished to close out the matter by making the payment. Further, petitioner stated that

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[3] Petitioner holds irrevocable powers of attorney from these six shareholder-directors to act on their behalf in recovering the bank's United States assets. Petitioner and these six fellow directors own 56% of the outstanding stock of the bank. During the course of litigation in this case, two more directors, holding an additional 15% share interest in the bank, fled as part of the "boat people" forced emigrations from Vietnam. This left only two remaining directors in Vietnam, whose whereabouts remain unknown.

in his view no license was necessary since the bank had been dissolved prior to April 30, 1975 both by virtue of the shareholder's resolution of April 15, 1975 and by virtue of the confiscation of the bank by the P.R.G.

In an addendum to his application, petitioner made the point that the directors outside Vietnam are acting as trustees in dissolution; these directors may act on behalf of shareholders and creditors outside of Vietnam; they would not be acting for the bank itself. The directors would therefore not in a strict sense be acting for a designated national.

The application appended an opinion of counsel which concluded that on the strength of Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); and Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968), cert.

denied 393 U.S. 924 (1969), the communist government successors to the bank "would have no claim at all to whatever assets and rights the Dong Phuong Bank may have in the United States."

Acting on behalf of the Secretary, the Office of Foreign Assets Control denied the license application on February 22, 1977 without mentioning the confiscation of the bank by the P.R.G. The denial letter (App. D) stated that the bank "had an interest in the funds due under all contracts which had been assigned to it." The resolution of April 15, 1975 "did not even purport to transfer the bank's interest in the United States assets to these shareholders. Further, no evidence has been submitted in support of the assertion that the resolution effected a valid dissolution of the corporation under the laws of South Vietnam." (App. D, 3-4).

Petitioner challenged the denial of the license application in the District Court and sought declaratory relief against the Secretary. In discovery, petitioner elicited from the Secretary via interrogotaries the following policy guideline concerning the issuance of licenses by the Secretary "in cases where the owner of blocked assets is a corporation" (R. 271):

> It is the established policy of the Office of Foreign Assets Control, in general, to deny application for unblocking assets of blocked corporations owned by nationals of a blocked country, wherever they may be located, subject to 31 C.F.R. 500.201, in order to preserve the assets intact from the date of blocking for possible use in a government program for the settlement of American claims against the governments of the designated country. Applications for licenses to unblock assets of corporations organized in a designated country on the effective date for that country are denied under this policy.

The District Court on cross-motions for summary judgment held that the bank was a "designated national" under the Foreign

Assets Control Regulations; therefore, the assets in the United States were subject to blocking. The Court determined that as of April 30, 1975, the bank had an interest in the funds due from the Army.

The shareholders resolution of April 15, 1975 had been insufficient formally to dissolve the bank or to transfer its foreign assets to its shareholders. The Court noted petitioner's affidavit testimony "that in the chaotic an dangerous situation during the final days of the Republic of Viet Nam, [the shareholders'] resolution came as close to dissolving the corporation as the shareholders dared to come." Nevertheless, the resolution had been insufficient "under Vietnamese law to dissolve the bank or transfer any of its assets to the shareholders; indeed, such a dissolution or transfer would, according to plaintiff, have been illegal under Vietnamese law."

(App. C, 17)

As for the seizure of the bank by the P.R.G., the District Court held that the very fact of confiscation made the P.R.G. "the successor-in-interest to all the Bank's claims." (App. C, 20). Thus, the P.R.G. had an interest in the Army claim under 31 C.F.R. § 500.201. The territorial restriction on the Act of State doctrine was rejected because "Vietnam is not a party to this action, and the validity of the confiscation is not in issue."

Petitioner's Fifth Amendment claims were rejected on the ground that "blocking is by its nature only a temporary action;" moreover, in the Court's view, petitioner had "failed to establish that he and his fellow shareholders had any constitutionally protected property interest in the claims owned by the bank." (App. C, 28)

On appeal, the Ninth Circuit also took a formalistic approach as to the corporate

resolution and refused to apply equitible doctrines to give the shareholders the assets in the United States.[5]

The territorial limitation on the Act of State doctrine was disposed of by the Court as follows (App. A, 28):

> Neither the decision of the Secretary nor the judgment of the District Court purported to determine title to the assets at issue. Rather the Secretary's decision simply continues in effect the temporary blocking of the transfer of those assets until a resolution of American claims is made or some other political agreement is reached with the P.R.G.

Petitioner's arguments that the blocking action by the Secretary constituted an unconstitutional taking without just compensation and violated his right to

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[5] "[E]ven if the document by its terms clearly manifested an intent to dissolve the Bank or Than adduced evidence in his application to support that claim, the Resolution would have been ineffective to dissolve the Bank. By Than's own admission, corporate dissolutions were forbidden in the waning days of the South Vietnamese Government. In general, [e]ffect must be given to the law of the situs wherein the Bank was incorporated and operated." (App. A, 22, f.n. 12).

equal protection of the laws were deemed "unpersuasive." Section 5(b) of the TWEA had "received the constitutional imprimatur of the Supreme Court in Propper v. Clark," 337 U.S. 472 (1949) (App. A, 28-29) and the Court quoted from Propper a suggestion that even in time of peace the broad powers of the executive under the TWEA "must be given generous scope to accomplish its purpose. * * * To do so has necessitated some inconvenience to our citizens and others who, as here, are not involved in any actions adverse to the Nation's interest." (Id., at 481-82.)

Blocking was deemed to be only "temporary." Because "blocking does not transfer title but prohibits temporarily, transactions involving those assets," (App. A, 30) the Court distinguished it from other forms of "taking" by the Govern-

ment.[6]

The government interest which justified the application of the blocking provisions in this case derived from the possiblity that the P.R.G. would claim the Army Funds. The interest of the P.R.G. in the blocked assets would allow the United States to "use the blocked funds as a diplomatic negotiating tool" in future negotiations with the P.R.G. (App. A, 36). This bargaining chip rationale related to a "legitimate governmental interest." (App.

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[6] The very same distinction was also used by the Court to deny petitioner a right to a trial de novo in the District Court. Section 9(a) of the TWEA, 50 U.S. App. §9(a) grants a right to a trial in the District Court whenever the government has by "seizure" taken control of property. The Court determined that the mere freezing of funds did not constitute a "seizure", so that a trial de novo was not available. Petitioner had to content himself in view of the Court with an Administrative Procedure Act appeal under 5 U.S.C. § 706(2). The entire record before the Secretary, however, consisted of a one-page form application with a brief addendum; a letter from counsel to petitioner; a letter from petitioner to the office of Foreign Assets Control; and a three-page letter denial of the application.

A, 36).

Petitioner's Motion for Reconsideration, timely filed, was denied by the Court by Order dated March 1, 1982 (App. B).

REASONS FOR GRANTING THE WRIT

The question is important for two reasons

I. THE DECISION BELOW RAISES SIGNIFICANT CONSTITUTIONAL AND STATUTORY ISSUES GROWING OUT OF RECURRING EFFORTS BY ALIEN OWNERS OF PRIVATE PROPERTY IN THE UNITED STATES TO UNBLOCK ASSETS FROZEN BY THE SECRETARY UNDER §5(b) OF THE TWEA.

The Ninth Circuit justifies the Secretary's refusal to unblock assets primarily under the bargaining chip rationale.[7] How-

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[7] "[I]t is conceivable that the United States could use the blocked funds as a diplomatic negotiating tool. Such use would serve a legitimate governmental interest." (App. A, 36). The Court describes but does not rely upon a further justification: "to provide a fund from which United States citizens could be compensated for injury occasioned them by designated countries." Ibid. This is the ground primarily relied upon by the Secretary in the Answer to the Complaint, and in the government's briefs before the District Court and the Court of Appeals.

ever, this Court has never sanctioned the freezing of foreign-owned private property, in the absence of a declared war, under this rationale.[8]

There are compelling reasons why this Court should now mark definitive guidelines for controlling the blocking of alien-owned private property in time of peace. At the time of this petition, funds belonging to Vietnamese and Cambodian nationals have been frozen for seven years by the Secre-

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[8] Thirty years ago, in a trilogy of cases, this Court considered the reach and effect of freezing controls on alien-owned property in time of declared war, when the powers of the Executive are at their peak. Orvis v. Brownell, 345 U.S. 183 (1953); Zittman v. McGrath, 341 U.S. 446 (1951); and Propper v. Clark, 337 U.S. 472 (1949). The Zittman Court pointed out that the blocking of "enemy" property (i.e., time of war) serves several salutary purposes, including promoting potential foreign relations uses such as "post-war negotiations and settlements." 341 U.S. at 454. The property of friendly aliens whose country is occupied by the enemy may also be blocked, but only to protect the owners' interests and to prevent the enemy from acquiring any benefit from these blocked assets. None of these tnree cases sanctioned the blocking of the private property of friendly aliens in time of peace.

tary.[9] The Secretary has blocked funds of Cuban corporations for 20 years.[10]

When a country falls to communist forces, a rush of refugees to the United States is likely to ensue; at the same time, the Secretary freezes the private property of all nationals of the fallen country within the United States, including the property of these refugees. With revolu-

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[9] Vietnam was added to the Foreign Assets Control Regulations as a "designated foreign country" effective April 30, 1975 at 12:00 p.m. e.d.t. and Cambodia was added effective April 17, 1975. See 31 C.F.R. §500.201(d) (Part I) (1981). The Secretary has refused to unblock assets of any corporation, confiscated or not, established under the laws of any designated country.
"Although you could in theory get a license, in fact you never got it... There was never any licensing program with respect to commercial transactions involving these countries that we have condemned, the Far Eastern communist countries." Hearings, House Committee on International Relations (Subcommittee on International Economic Policy and Trade) "Trading with the Enemy Reform Legislation" (March 29, 1977); (testimony of Andreas F. Lowenfeld), pp. 4-5.

[10] In 1962, the Secretary issued the Cuban Assets Control Regulations, 31 C.F.R. Part 515, which placed Cuba on a special proscribed list. These regulations are but parallel control provisions to the Foreign Assets Control Regulations; they differ only in that they apply to Cuba specifically.

tionary forces now threatening the stability of governments in countries on several continents the potential is great for further blocking.[11]

The Secretary's blocking action is improper under appropriate consitutional and statutory standards. Refugee-shareholder litigants and lower courts urgently need this Court to clarify the applicable standards and to secure compliance with the standards by the Secretary. In this regard there are several important questions which have been unanswered or in-

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[11] The decision below should frighten aliens in unstable countries where revolutionary forces threaten to gain an upper hand. These aliens will be encouraged to withdraw funds from the United States in fear that in the event of a crisis the United States will freeze their U.S.-situated assets under the successor to §5(b) -- §203(a)(1) of the International Emergency Economi Powers Act, 50 U.S.C. §1702(a)(1). Such encouragement is obviously adverse to United States interests. For instance, a withdrawal of assets privately held in the United States by nationals of one or more OPEC nations would have a catastrophic effect on the financial institutions and balance of payments position of the United States.

adequately considered:

(A) Is the bargaining chip justification constitutionally adequate to permit the Secretary to withhold assets of confiscated foreign corporations from their refugee shareholders, when this Court has determined that the United States may not use the property of alien friends to compensate U.S. citizens for wartime losses?

In Kaufman v. Societe Internationale, 343 U.S. 156 (1952), this Court determined that a seizure under Section 5(b) of the Act "requires consideration of the plight of innocent stockholders." Section 5(b) "does not contemplate appropriation of friendly or neutral assets. While Congress has clearly provided for forfeiture of enemy assets, it has used no language requiring us to hold that innocent interests must be confiscated because of the guilt of other

stockholders."[12]

The Court below considered Kaufman inapplicable because "[t]he blocking of the assets ... does not affect the interest, right or title to them which [petitioner] may possess .... The blocking action merely suspends indefinitely the right to transfer these funds." (App. A, 16). However, this Court has never taken such a view of the consequences of the freezing of assets. The postponement of the return of property

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12 343 U.S. at 159. In Pernikoff v. Kennedy, 219 F.Supp. 854 (D.D.C. 1963), the Secretary blocked funds in a U.S. bank belonging to a German corporation established prior to World War II by a French citizen who had lived in Germany. After the war, the Secretary sought to vest title in these funds in the United States. The shareholder had died, and his two heirs, both foreign residents, brought suit under §9(a) of the Act to recover the funds. Relying upon the rationale in Zittman v. McGrath 341 U.S. 446 (1951), that a principal justification for the freezing was to preserve the assets for a return to their individual owner, the court concluded that "[s]uch 'protection' would be illusory indeed if, after the freezing program had succeeded in keeping the funds from Nazi hands, those funds are not returned to heirs of the person for whom the protection was designed in the first place." 219 F.Supp. at 860.

constitutes a deprivation just as much as the taking of the property itself.[13]

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[13] Seibert v. United States, 122 U.S. 284 (1887); Louisiana v. New Orleans, 102 U.S. 203 (1880). See also, Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972). ("[A] temporary, nominal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment.") Indeed, the long-term blocking of the property destroys it piecemeal through the erosion caused by inflationary pressures and high interest rates.

In 1979, the Regulations were amended in 31 C.F.R. §500.205(b) to require government agencies to deposit blocked assets into interest-bearing blocked accounts, unless the General Counsel of the agency involved has certified that the agency cannot comply with the requirement because of a statutory disability. The Army has not complied with this section and the funds represented by the claims have accordingly not been bearing interest.

Further, where, as here, the blocked asset consists of a chose-in-action, the claim may be time-barred. There is nothing in the TWEA which itself tolls petitioner's claim against the Army, and blocking by the Secretary does not of itself toll the statute of limitations. See Gazda v. United States, 108 F.Supp. 516 (Ct.Cl. 1952). Accordingly, Vietnamese having such claims must file suit against the United States before the six-year statute set out in 28 U.S.C. §2401(a) has lapsed. and petitioner has done just that before the Court of Claims in Civil No. 287-81C. That action has been stayed pending the outcome of these proceedings.

It makes little sense to block petitioner's property as a counter in future negotiations with the P.R.G., to induce payment by the P.R.G. from unrelated funds to U.S.-citizen claimants. The P.R.G. has no interest in having blocked funds released to Vietnamese who have fled Vietnam and who are hostile to the communist regime. The P.R.G. can only have an interest in having funds owned by Vietnamese nationals still in Vietnam or in funds of the old Republic of Vietnam (South Vietnam).[14]

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[14] These two categories are not here involved. Petitioner has not questioned the Government's right to freeze the property of persons who reside in the territory of the foreign country which is the target of economic sanctions imposed by the Executive. Blocking under those circumstances serves a dual purpose of protecting the interests of the owners, and at the same time denying to the designated state access to hard currency -- the pivotal issue in Sardino v. Federal Reserve Bank, 361 F.2d 106 (2d Cir. 1966), cert. denied 385 U.S. 898 (1966).

The bargaining chip rationale for blocking petitioner's assets is highly suspect. The freezing of funds is either a prelude to vesting and the use of such funds to pay debts owed by the P.R.G. to U.S. citizens -- i.e., taking property from friendly aliens in time of peace to pay the unrelated claims of U.S. citizens -- or it has no purpose whatsoever.

Since Kaufman has declared that the vesting of an alien's assets in the United States for payment into a claims fund from which U.S. nationals would be compensated cannot lawfully be accomplished, the long-term blocking of petitioner's assets in anticipation of such a use must also be improper.

(B) Does a communist government have sufficient interest in a private corporation's assets to justify the Secretary's withholding such property from the cor-

poration's refugee shareholders?

The decision of the court below concludes that it is "not unreasonable to assume that assets owned by an entity incorporated under the laws of South Vietnam are assets in which the P.R.G., as the successor government, has an interest." (App. A, 35.) The Ninth Circuit also states that it is not "unreasonable to acknowledge the possibility that a foreign country would assert an interest in the assets of corporations organized under its laws." (Id.)

These statements of potential "interest" by a communist government in property owned by former nationals of that country reflect a view of the relationship between the state and the property rights of its citizens which is total anathema to the Fifth Amendment. This Court has never recognized the doctrine that a foreign

state has an interest in all private property of its citizens by virtue of its potential as a sovereign to proclaim such an interest.

The Act of State doctrine has long held that the confiscatory decrees of a foreign state will not be given effect in this country, even where directed against its own nationals. Furthermore, the owners or shareholders of a confiscated foreign corporation have a right to recover the corporation's foreign assets which have escaped the reach of the confiscating state.[15] The doctrine is

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15 See, e.g., Mendez v. Saks & Co., 485 F.2d 1355 (2d Cir. 1973), rev'd on other grounds sub nom. Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976); Maltina Corporation v. Cawy Bottling Co., 462 F.2d 1021 (5th Cir. 1972), cert. denied 409 U.S. 1060 (1972); Moscow Fire Ins. Co. v. Bank of N.Y. & Trust Co., 280 N.Y. 286, 20 N.E.2d 758 (1939), aff'd by an equally divided court sub nom. United States v. Moscow Fire Ins. Co., 309 U.S. 624 (1940); Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co., 392 F.2d 706 (5th Cir. 1968), cert. denied 393 U.S. 924 (1969); Zwack v. Kraus Bros. & Co., 237 F.2d 255 (2d Cir. 1956); Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F.Supp. 892 (S.D.N.Y.

(footnote cont'd.)

based upon public policy considerations and has constitutional underpinnings.[16]

This territorial limitation on the Act of State doctrine is here rejected by the Court of Appeal. Its decision actually gives effect in the United States to the foreign confiscation. If petitioner's frozen assets are ultimately paid to U.S. claimants against the P.R.G., the latter will benefit just as if it had used its own funds to pay its U.S. creditors.[17]

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1968), mod on other grounds 433 F.2d 686 (2d Cir. 1970).

The rule has also been adopted in the Restatement (Second), Foreign Relations Law of the United States §43 (1965).

[16] Republic of Iraq v. First National City Bank, 353 F.2d 47, 52 (2d Cir. 1965), cert. denied 382 U.S. 1027 (1966); Pfizer, Inc. v. Lord, 522 F.2d 612, 619-620 (8th Cir. 1975), cert. denied 424 U.S. 950 (1976).

[17] The main U.S. creditors of the P.R.G. are, of course, large U.S. corporations to which the Republic of Vietnam had been indebted. The United States government is itself a major creditor and would presumably share in any distribution of petitioner's funds. (R., 317-318; 384).

To deprive owners of blocked property of redress because the foreign government "may declare itself to be the successor of the [corporation] via expropriation and may, at any time, seek to assert such an interest" (App. A, 26), "would effectively accomplish for the confiscating government precisely what we hold it cannot do, i.e., confiscate at will assets having a situs within this country." Zwack v. Kraus Bros. & Co., 237 F.2d 255 at 259 (2d Cir. 1956).

(C) Does the Secretary have authority to define as an "interest" adequate under §5(b) the potential assertion to ownership rights by a foreign revolutionary government in a corporation established by the pre-revolutionary government and to use such potential assertion as the basis for freezing the assets in the United States of such corporation?

Under traditional concepts of property rights, the P.R.G. has no "interest"[18] in petitioner's assets frozen by the Secretary.

The Congress gave no indication in the TWEA or in its legislative history that it intended to broaden the term beyond its traditional meaning. Nevertheless, the Secretary has created a new "interest" which has been sanctioned by the decision below: i.e.,that which a foreign government might assert in the future "in the assets of corporations organized under its laws." (App. A, 35).

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[18] Under §5(b)(1)(B), the President may "void, prevent or prohibit, any ... use, transfer, ... or exercising [of] any right, power, or privilege with respect to ... any property in which any foreign country or a national thereof has any interest." (Emphasis added). The Secretary has defined "interest" to include "an interest of any nature whatsoever, direct or indirect. 31 C.F.R. §500.312.

If the Secretary can create interests hitherto unknown to the law of property, he can block private property in the United States owned by refugee aliens for any reason. To define the power to define, without any standard, what is a proscribed "interest" amounts to free rein to freeze property without limitation.

In Real v. Simon, 510 F.2d 557 (5th Cir. 1975) the argument in favor of such free rein was rejected. The Court there would not permit the Secretary to find that a dead person has an "interest" in property held by his estate adequate to justify withholding the assets from U.S. residents. The Secretary could only block property interests known to the law.[19]

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[19] "The concept that a dead person is a 'foreign national' in possession of property within the meaning of the Trading with the Enemy Act does not have the support of logic. Under the facts presented in this case, such a determination does not have the support of the Congressional policies behind the Act. We conclude, therefore, that... the Government's determination that the deceased,

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The authority of an administrative agency to promulgate regulations is limited by the statute authorizing the regulations.[20]

The Congress never intended to grant authority to block without limitation of any kind; it certainly did not intend to allow the Secretary to justify the long-term freezing of the property of friendly aliens under a rationale which can only help effectuate foreign confiscation.

II. THE DECISION BELOW RAISES SIGNIFICANT RECURRING ISSUES OF PUBLIC POLICY CONCERNING THE REQUIREMENT THAT ALIEN SHAREHOLDERS FLEEING FROM FOREIGN REVOLUTIONARY

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Urbano Real, retains an interest in his estate which justifies withholding the assets from American citizens and aresidents has no basis in law and must be set aside and annulled." (510 F.2d at 564).

Richardson v. Simm, 560 F.2d 500 (2d Cir. 1977) is contra, thus showing the confusion in this area.

20 Ruiz v. Morton, 415 U.S. 199, 232 (1974); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946).

UPHEAVALS SATISFY THE CORPORATE FORMALITIES OF THE PRE-REVOLUTION STATE OF INCORPORATION AS A CONDITION FOR RETRIEVING ASSETS IN THE UNITED STATES.

The Ninth Circuit holds petitioner to a punctilious compliance with the corporate law requirements of the fallen Republic of Vietnam in order to accomplish dissolution of the corporation. [21]

The Court below refuses to consider the consequences of an actual confiscation by the P.R.G. of the corporation's assets in

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[21] At the time the April 15, 1975 resolution was considered and adopted by the shareholders/directors, the governmental regime of the Republic of Vietnam was collapsing; institutions which marked such stability as had earlier existed in Vietnamese society were no longer functioning. Normal corporate procedures, including those prescribed by the legal codes of Vietnam regarding corporate dissolution were unavailable (R.148-149). Both the Secretary and the Court of Appeal, however, require that the precise formalities prescribed by Vietnamese law for corporate dissolution should have been followed.

Vietnam;[22] instead, it prefers the fiction that the defunct bank corporation, as an ongoing, juridical entity, continues to hold the assets in the United States. The court below rejects equitable arguments,[23] and formalistically reaches a conclusion which disables the alien owners of property frozen by the Secretary from salvaging that property.

The decision below veers sharply from the approach taken by other courts, including Federal courts of appeal and the highest court of the state of New York. Those courts have assisted shareholders

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22 The fact of confiscation was included in the record before the Secretary; it was argued extensively before the District Court without objection by the Secretary (since petitioner proceeded in his discovery and in his motion for summary judgment as if this were a §9(a) trial de novo).

23 A proceeding under §9(a) is one "in equity." A hearing to unblock assets should similarly be governed by equitable considerations.

fleeing from revolutionary regimes to recover assets in the United States which have escaped the foreign confiscator's reach:

(A) Unlike the Ninth Circuit, "in tracing ownership of United States property cast adrift by the 'extraordinary and basically unfair measure' of expropriation without compensation," the Fifth and Second Circuits "'have developed a willingness to disregard technicalities in favor of equitable considerations.'"[24]

These two Circuits regard the refugee shareholders as retaining "continuing dominion ... over property with an American situs: the former owners retain equitable title to the American property."[25]

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24 Maltina Corporation v. Cawy Bottling Company, 462 F.2d 1021 at 1028 (5th Cir. 1972), quoting from Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 293 F.Supp. 892 at 898 (S.D.N.Y. 1968), mod. on other grounds 433 F.2d 686 (2d Cir. 1970).

25 Maltina Corporation, at 1028. See, Zwack v. Kraus Bros. & Co., 93 F.Supp. 963 (S.D.N.Y. 1954), aff'd. 237 F.2d 255 (2d Cir. 1956).

"Alternatively, it might be said that the dissolution is effective in the foreign state, but the corporation retains a de facto existence in the United States beyond the territorial reach of the confiscating government."[26]

(B) Unlike the Ninth Circuit, the highest court in New York long ago rejected corporate formalism in James & Co. v. Rossia Ins. Co., 247 N.Y. 262, 160 N.E. 364 (Ct.App. 1928). It refused to accept arguments that the letter of the law, as it existed under the pre-revolutionary government of Russia, should interfere with efforts by refugee shareholders to salvage corporate assets in the United States.[27]

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26 Maltina Corporation, at 1028.

27 The letter of the law, as it existed under the empire of the Czar, may have forbidden investment by a Russian corporation in the shares of any other corporation. That law had been swept away

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In Petrogradsky Mejdunarodny Kommerchesky v. National City Bank, 263 N.Y. 263,

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by the power of revolution. The decree of the Soviet Republic assumed to confiscate 'all available property' of the Rossia. If we were to recognize and enforce that destructive proclamation, the Bolshevik government rather than this plaintiff would be the gainer. When old institutions have fallen and none which we will recognize have succeeded, how shall we deal with foreign owners of property within our jurisdiction? We cast aside rigid rules made to control other conditions. * * * We view with some degree of indulgence the honest, though possibly irregular, efforts of a resident agent of foreign property and of statutory trustees controlling that property when they are far removed from the owner, when mails and cables are interrupted, when old governments and old laws are overthrown, and no new government and no new law acceptable to our institutions have been established. * * * The Rossia of Petrograd may under the Soviet decree, have ceased on April 1, 1919, to exist in Russia. Even here, its corporate life may have expired. It was half dead and half alive. We make no effort to define the authority of its directors as such. We do hold that these proscibed individuals fleeing from the fury of the revolution retained the power to conserve property in this country as far as the courts of New York can protect it.

-- 160 N.E. at 367.

170 N.E. 479 (1930), cert. denied 282 U.S. 878 (1930), Justice Cardozo, speaking for the Court found it "incredible" that the assets of a corporation should be subject to "spoilation and destruction" because of the inability of the directors of a confiscated corporation to satisfy technicalities of Russian law.[28]

The assets of a Russian bank had been seized by the Soviet government, the bank dissolved, and the directors driven into exile. When the refugee directors sought to recover the bank's deposits in this country, the New York depositary refused to turn over the assets, contending that the bank had been dissolved in Russia by the Soviet government and was no longer a jur-

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28 Testimony much more explicit and persuasive than any offered by the defendant would be necessary in order to lead us to the acceptance of a conclusion so grotesque. * * * '[A] resolution thus adopted would have the force to be attributed to the action of de facto managers, speaking and acting for the corporation in an emergency too urgent to wait upon formality.
-- 170 N.E. at 485.

istic person, and that if a juristic person, its former directors were without authority to act on its behalf.

Regardless what the Soviet government did to the bank and its assets in Rusia, in the view of the New York Court it continued as a de facto entity in the United States as long as it had assets in New York. The bank's refugee-directors were entitled to recover the assets here:

> The case comes down to this: A fund is in this State with title vested in the plaintiff at the time of the deposit. Nothing to divest that title has ever happened here or elsewhere. The directors who made the deposit in the name of the corporation or continued in that name now ask to get it back. Either it must be paid to the depositor, acting by them, or it must be kept here indefinitely. Either they must control the custody, or for the present and the indefnite future it is not controllable by any one. The defendant expresses the fear that the money may be misapplied if the custody is changed. The fear has its ba-

> sis in nothing more than mere suspicion. The directors, men of honor presumably, will be charged with the duties of trustees, and will be subject to prosecution, civil or criminal, if those duties are ignored. The defendant is not required to follow the money into their hands to see how thy apply it. Its duty is t pay. -- 170 N.E. at 486.

The decision below compels Vietnamese refugees to bear the burden of satisfying the claims of U.S.-citizen creditors against the communist regime in Vietnam. Such a determination is a cruel hoax on Vietnamese refugees. Prior to April 30, 1975, the United States sided with the Vietnamese people in their effort to ward off communist aggression. The United States contracted through U.S. military organs for the supply of extensive goods and services. However, immediately upon the fall of Vietnam, the United States froze the assets of its contracting part-

ners and has refused to pay its debts, even where the owners of the contracting companies have fled Vietnam as part of the "boat people" emigrations or, as in the case of petitioner, fled Vietnam just prior to its fall to communist forces in 1975.

Since the Republic of Vietnam collapsed in 1975, more than 1.2 million people have fled Indo-China. As of March 1982, the United States has admitted 589,000 refugees from Indo-China and has resettled them in this country. Currently, 71% of Indo-Chinese immigrants are dependent upon public funds.[29] Assets frozen by the Secretary would allow their refugee owners, such as petitioner, to begin a new life in this country and in this generation.

There is no public policy set out in

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29 "No More Room For Refugees," Time, vol. 119, No. 19 (May 10, 1982), p. 17.

the TWEA that justifies the Secretary in singling out the property of defunct Vietnamese corporations to bear disproportionately the burden of promoting this Nation's foreign policy objectives with respect to the communist regime in Vietnam.[30]

In practical terms, the importance which the decision below places on the continued formal ownership by the bank corporation of assets located in the United States serves to undermine the territorial restriction on the Act of State doctrine. The Fifth and Second Circuits

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[30] "The government must pay just compensation when it furthers the Nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by relatively few persons and subject to the jurisdiction of our Courts." Dames & Moore v. Regan, _ U.S. _, 101 S.Ct. 2972, 2993, 69 L.Ed.2d 918, 947 (1981) (concurring opinion by Mr. Justice Powell) (footnote omitted). The just compensation proviso of the Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960); Agins v. City of Tiburon, 447 U.S. 255 (1980).

and the state courts of New York, discerning the folly of such an approach, choose a different path. [31]

Because the approach predetermines the result, the divergence between the decision below and those of the Second and Fifth Circuits and the Courts of the State of New York, in such a vital matter, justifies the grant of a writ of certiorari to review the judgment below.

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[31] [W]e do not lay great stress on the subtleties of the concepts of continued dominion over property located within the United States. Our decision today, our prior decision in Tabacalera [Severiano Jorge, S.A. v. Standard Cigar Co. 392 F.2d 706 (5th Cir. 1968) cert. denied 393 U.S. 924 (1968)], and those of our brother courts as well are based upon the fundamental realization that to sustain the reasoning of the district court in the present case would, in practical terms, mean the end of territorial restriction on the Act of State doctrine.

--"Maltina Corporation v. Cawy Bottling Co., 462 F.2d 1021 at 1028.

CONCLUSIONS

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted

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